

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-2288

To be argued by
CHARLES E. PADGETT

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2288

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENNIE HINES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

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—v.—

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Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Bennie Hines appeals from a judgment of conviction entered on August 23, 1974, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Inzer B. Wyatt, United States District Judge, sitting without a jury.

Indictment 74 Cr. 268, filed on March 18, 1974, charged Hines in five counts with wilful failure to file federal income tax returns for the years 1968 through 1972, in violation of Title 26, United States Code, Section 7203.

The case was tried on May 7 and 8, 1974. Judge Wyatt reserved decision and on July 3, 1974 found Hines guilty on all five counts.

On August 23, 1974, Judge Wyatt imposed consecutive one year sentences on Counts One and Two, and suspended imposition of sentence on each of Counts Three through Five, imposing five year terms of probation on each of those three counts.

Hines remains at liberty pending this appeal.

The Government's Case

Introduction

Through Hines' detailed admissions to a fellow pimp, two police officers and a Secret Service Agent, the Government established without any contradiction that during the five tax years in question Hines ran a flourishing prostitution business in New York City. The evidence offered by the Government to show that Hines wilfully failed to file federal income tax returns for those years was as follows:

1. Proof that the defendant's gross income was sufficiently large in the years in question to require the filing of federal income tax returns

The Government relied at trial upon the "expenditures" theory of proof to establish that Hines' gross income for the years in question was in excess of the minimum amounts for filing.* The "expenditures" theory, a variant of the

* Those minimum amounts for the tax years in question were as follows:

1968	\$ 600
1969	600
1970	1,700
1971	1,700
1972	2,050 ()

References to "GX" and "DX" are to Government exhibits and defendant's exhibits, respectively. References prefixed "A" are to defendants appendix, and references prefixed "Tr." are to the trial transcript.

"net worth" theory, see *Holland v. United States*, 348 U.S. 12 (1950), focuses on a taxpayer's expenditures during a tax year or years as circumstantial proof of income received. The theory, applicable to both evasion and failure to file cases, was explained as follows in *United States v. Caserta*, 199 F.2d 905, 907 (3d Cir. 1952):

"It starts with an appraisal of the taxpayer's net worth situation at the beginning of a period. He may have much or he may have nothing. If, during that period, his expenditures have exceeded the amount he has returned as income and his net worth at the end of the period is the same as it was at the beginning (or any difference accounted for), then it may be concluded that his income tax return shows less income than he has in fact received."

The "elements" of the expenditures theory which the Government proved at trial were: That defendant had virtually no net worth as of January 1, 1968; that the defendant made sufficient cash expenditures during the tax years in question to exceed the required amount of income for filing; and that the defendant did not have available non-income funds during the tax years which could account for these expenses.

(a) Proof of opening net worth

The Government proved the following to establish that Hines had virtually no net worth as of January 1, 1968, the first of the tax years in question.*

* The only assets discovered in the investigation as of January 1, 1968 were \$10 in a savings bank account (GX 33) and \$775 in furniture (GX 50). However, the \$10 remained in the account throughout the tax years in question, and the furniture was repossessed in December, 1970, so that even these minimal assets did not provide a source for the expenses incurred in 1968-1972.

(i) *Inheritance.* A search of Surrogate Court records in Memphis, Tennessee (Hines' birthplace) from 1940 (his birthdate), onward and in New York City from 1966 onward, showed that Hines received a single inheritance in the sum of \$1,000 in 1953 (GX 107, GX 26-29). This amount, representing proceeds on an insurance policy on the life of Hines' father, who died in Cook County, Illinois in 1952, was encroached upon several times for clothing and bedding for Hines during the 1950's upon the claim of his unemployed mother that she could not provide for Hines. A court order in September, 1960, shortly before Hines' 20th birthday, authorized payment out of the corpus, which then consisted of about \$700, of \$301 for certain legal and related fees, on the ground that "no other funds" existed to pay the fees (GX 107). This evidence showed conclusively that Hines and his mother were penniless in 1960.*

(ii) *Social Security Records.* From 1960 through 1967, Social Security records showed earning for Hines in the total amount of \$2,460, with no earnings whatsoever beyond the year 1962 (GX 24).** This evidence excluded the possibility that in any years prior to the tax years on trial, the defendant had received and perhaps hoarded substantial monies as a salaried employee.

(iii) *Real estate transactions.* A search of grantor-grantee records in the New York City area for 1966 and 1967 failed to show the purchase or sale of any real property by Hines during those years (GX 30; Tr. 114).

(iv) *Bank accounts.* A search by the Government of the records of some forty-four New York City area banks

* In December, 1961, a final disbursement of \$352.11 was paid over to Hines (GX 107).

** The 1960 through 1962 earnings were at a billiard room in Memphis, Tennessee (GX 24).

for the years 1965 through 1967 disclosed only one account in any of the names which Hines was known to have used.* This one account was a savings account opened by Hines in October, 1967, only several months before the first tax year in question, in which Hines made an initial \$10 deposit and never added a penny thereafter. (A. 124a-146a; GX 31-33). *Prima facie*, therefore, Hines knew what a savings account was but saved no money.

(v) *Installment purchase—late 1967 and early 1968.* In November, 1967, one month before the starting point of January 1, 1968, Hines purchased for \$775 a bedroom and dinette furniture set, paying only \$250 down and contracting to pay the balance in \$50 monthly installments (GX 50). That this installment purchase reflected a habit of installment buying is shown by the fact that Hines made other installment purchases of mattresses, TV sets and other items from the same store in April, 1968, May 1968 and August 1969 (GX 48-59). Hines' decision not to pay cash for this relatively small November 1967 expenditure is entirely inconsistent with any theory that his \$16,529 in 1968 expenditures (see tables following), and a *fortiori* his even larger expenditures in later years, were paid for out of a hoard existing in January, 1968.

* The Government also searched with negative results for bank accounts in Lorraine, Ohio, where Hines had falsely stated in a lease application that he had a bank account (A. 130a; GX 15).

(b) Proof of Expenditures

The Government offered the following proof at trial of expenditures made by the defendant during the tax years in question:

1968

1. Apartment Rentals	\$ 3,550	GX 34, 35	Tr. 119, 120
2. Auto Purchases	5,057	GX 68	Tr. 135, 137
3. Auto Financing Charges	1,615	GX 75	Tr. 139, 140
4. Furniture Purchases	2,552	GX 48, 50	Tr. 123, 125
5. Auto Repairs	2,615	GX 82	Tr. 142
6. Cost of Living *	\$ 1,140	GX 106	Tr. 151, 152
	<hr/>		
	\$16,529	Total	

1969

1. Apartment Rentals	\$ 4,400	GX 34, 35	Tr. 119, 120
2. Auto Financing Charges	2,575	GX 76	Tr. 140, 141
3. Furniture Purchases	2,140	GX 48, 50	Tr. 123, 125
4. Tailoring	700	GX 60	Tr. 128
5. Auto Repairs	1,039	GX 82, 84	Tr. 142, 144
6. Cost of Living *	\$1,380		
	<hr/>		
	\$12,234	Total	

1970

1. Apartment Rentals	\$ 6,234	GX 11, 12, 13	Tr. 57-65
2. Auto Purchase	500	GX 77	Tr. 140, 141
3. Auto Financing	3,229	GX 76, 78 79, 80	Tr. 139 thru 142
4. Furniture Payments	310	GX 48, 49	Tr. 123, 124 125
5. Clothing Purchases	700	GX 60	Tr. 128
6. Auto Repairs	400	GX 66	Tr. 133, 134
7. Cost of Living *	\$ 1,470	GX 106	Tr. 151, 152
	<hr/>		
	\$12,813	Total	

1971

1. Apartment Rentals	\$16,600	GX 34, 35, 45	Tr. 119, 120
		11, 12, 13,	122, 57
		16, 17, 108	thru 65, 76
			thru 247
2. Auto Purchase	5,620	GX 68 thru 78	Tr. 135 thru
			139
3. Auto Financing Charges	771	GX 76 thru 80	Tr. 139 thru
			142
4. Auto Repair	194	GX 67	Tr. 133, 134
5. Western Union	290	GX 98, 101,	Tr. 143
		104, 105	
6. Cost of Living *	<u>1,520</u>	GX 106	Tr. 151, 152
	<u>\$24,895</u>	Total	

1972

1. Apartment Rentals	\$13,710	GX 34, 35, 45	Tr. 119, 120,
		16, 17, 111	122, 76 thru
			245, 246
2. Auto Financing Charges	1,800	GX 68-71	Tr. 135 thru
			139
3. Legal Fees	100	GX 39	Tr. 120
4. Clothing Repair	360	GX 64	Tr. 133
5. Cost of Living *	<u>\$ 1,570</u>	GX 106	Tr. 151, 152
	<u>\$17,540</u>	Total	

* The cost of living figure shown in GX 106 has been reduced by 60% to conform with the welfare level testimony at the trial (Tr. 156).

(c) Proof negating the availability of non-income funds during the tax years 1968-72

Having shown that Hines had virtually no net worth on January 1, 1968, and that he made substantial cash expenditures during the five tax years which followed, the Government was next required to negate the proposition that the defendant may have had non-income monies, acquired during those five years, which were used for those expenditures. To this end, the Government brought forward its inheritance (GX 26-29), real estate (GX 30) and bank proof (GX 31-33; A. 124a-146a) from 1968 through 1972, all with negative results. In addition, the proof concerning the savings bank account referred to above—that no deposits were made during *any* of the tax years 1968-1972—was strongly corroborative of the non-availability of a hoard of funds during those years, leaving open only the traditional “black box” defense of a hoard of cash maintained at home. As indicated above, the existence of a savings account at a local bank made such a defense the remotest of possibilities, and indeed it was never asserted.

Finally, the Government offered conclusive circumstantial proof that as of December, 1970, Hines had been spending whatever monies he had as he received them, and had no hoarded funds whatsoever. In November 1967, as indicated above, Hines contracted to buy for \$775 a bedroom and dinette furniture set, paying \$250 down and contracting to pay the balance in \$50 monthly installments. In April and May of 1968, Hines added more purchases, totaling \$3,815, of other items of furniture, on basically equivalent terms. In December, 1970, with Hines owing a balance of only \$580, the merchandise was repossessed for non-payment (GX 49, 50).

(d) Proof of a likely source of income

Although evidence of a likely source of taxable income during the tax years in question is *not* an indispensable element of proof under the net worth or expenditure theories,* the Government's proof that the defendant operated a continuing, lucrative pimping business from 1968 through 1972 was strong, direct and entirely uncontested. The Government proved not a "likely" but an admitted and certain source of substantial income:

On October 25, 1967, Hines told Secret Service Agent Daniel Hurley that his occupation was "gambler, pimp and hustler" (Tr. 37).

Between 1968 and 1974, New York City Police Officer James Rothstein had over one hundred conversations with Hines. These conversations included, among other things, discussions about obtaining attorneys to represent prostitutes who were working for Hines and the size of the fees they charged (Tr. 230-32), about Hines' insistence that his girls worked even in bad weather (Tr. 233), and about Hines' practice of taking his girls with him on occasions when he went from one city to another (Tr. 234).

In July, 1973, Hines told New York City Police Officer Anthony Vitaliano that he was leaving New York City "because his girls weren't giving him enough money" (Tr. 170, 175).

Roosevelt Bell, himself an admitted pimp, had "thousands of conversations" with Hines over the last "eight or nine years" (A. 149a-150a). The conversations invariably

* See *United States v. Massei*, 355 U.S. 595 (1958); *United States v. Schipani*, 293 F. Supp. 156 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262, 1267 (2d Cir. 1969).

related to Hines' and Bell's respective pimping businesses. As Bell testified:

" . . . we been talking about pimping, and that's all we talk about, like two baseball players, they talk about baseball, we talk about pimping" (A. 150a).

In 1969 or 1970, Hines said to Bell concerning a prostitute named Judy that "she make good money, but she is really flipping at the mouth" (A. 150a-52a).

In 1973, Hines said to Bell concerning a prostitute named Debbie Peterson that he was going to fire her because "she couldn't get no money". Bell was told by Hines that the girl was making two hundred dollars a week, which "aint no money" (A. 153a-54a). In the same year Hines commented to Bell about another girl, Toni, that she "couldn't get no money" (A. 154a).

Bell testified to a series of other conversations evidencing the management by Hines of a continuing, active prostitute business (A. 147a-59a). The defense did not cross-examine Bell with respect to any of his conversations with Hines (A. 159a-69a).*

2. Proof that the defendant did not file Federal Income Tax returns for the years in question

The defendant conceded that he had not filed returns (A. 204a).

3. Proof of wilfulness

The record in this short trial was riddled with proof of Hines' concealment of his true identity and employment, and with proof that he transacted substantial business dealings in cash.

* The Government also proved that in November 1970 Hines told a real estate agent that his annual income was \$25,000 (GX 15). However, it was stipulated that all such statements by Hines as to his employment were false (Tr. 264).

Concealment of Identity: Hines was shown to have used the false names Charles Daniels in 1968 and 1969; Charles Daniels, Ernest Williamson, Ralph Byrd and John Webster in 1970; Ernest Williamson, Ralph Byrd and John Webster in 1971; and Ernest Williamson and Ralph Byrd in 1972.*

Concealment of Employment: In March, 1970 (GX 38, 44; DX E), November, 1970 (GX 15, 46; DX E), December, 1970 (GX 11, 47; DX E), March, 1971 (GX 113, 61; DX E), and December, 1971 (GX 111, 63; DX E), Hines made five separate false statements as to how he was employed, all in connection with lease applications. Indeed Hines conceded that *every* statement made by him as to his employment in *every* document offered by the Government was false (DX E).

Dealings in Cash: Hines used cash or money orders for the following disbursements: rent at 400 East 77th Street (Tr. 21) and 333 East 34th Street (Tr. 76); furniture purchases totaling \$5,287 in cash (GX 48); auto purchases totaling \$6,972 in cash down payments (GX 68, 72, 73, 77A, 87-105, 88-97); and Western Union money orders to various persons including auto dealers (not included in the sum of \$6,972 shown above) in excess of \$3,100 (GX 87-105).

The Defense

Apart from stipulating that he had never filed any tax returns and that his statements about employment on documents offered by the Government were all lies, Hines offered no evidence whatsoever (DX D, E; A. 204a-06a).

* The cites are as follows: Charles Daniels (GX 34-36, 45, 50, 51, 56, Tr. 19, 21); Ernest Williamson (GX 37, 39, 51, 56; Tr. 19, 21); John Webster (GX 11, 12; Tr. 56, 66); Ralph Byrd (GX 16, 112, 113; Tr. 95, 81, 216).

ARGUMENT**POINT I**

The Government amply proved that Hines had sufficient gross income from pimping in the tax years in question to require that he file personal income tax returns.

Hines attacks the weight of the Government's circumstantial proof that he had sufficient gross income in the years in question to necessitate the filing of returns. However, the evidence was ample and Hines' complaints amount to no more than nitpicking.

The evidence offered by the Government to show that Hines had no source of funds other than taxable income to account for the \$12,000 to \$24,000 in expenses which he incurred in each of the 1968 through 1972 tax years boils down to this: (1) In 1960, when he was 20 and seven years after his father's death, Hines and his mother were penniless; (2) Hines' salaried income from 1960 through 1962 was a total of less than \$2,500 and from 1962 up until 1968, the first tax year in question, was *nothing*; (3) Although Hines was shown to be living in New York in 1966 through 1972, a check of forty-five New York City banks from 1966 through 1972 failed to disclose that Hines had any money on deposit; (4) On the other hand, this canvass of banks *did* disclose that Hines opened a savings bank account in New York City in October 1967, put \$10 in the account, and never added a penny thereafter. This was extremely strong evidence that Hines knew what a savings account was for, but simply saved no money at all; (5) In November, 1967, April, 1968, May, 1968 and April, 1969, Hines made modest purchases of furniture, mattresses and a TV set *on the installment plan*, and then in December,

1970, suffered the repossession of some of these items for non-payment, when he owed only \$580 on them. This evidence further demonstrated that Hines was not saving a penny; (6) Finally, the evidence was conclusive—indeed completely unchallenged—that Hines was running a flourishing pimping business during the years in question, representing an obvious source of substantial gross income.*

The Government's burden of proof on its direct case is to exclude beyond any reasonable doubt non-income sources for the expenditures which it proves. The Government need not, however, exclude on its case *all possible* innocent explanations. As the Supreme Court stated in *Holland v. United States*, 348 U.S. 121, 139 (1950):

“ . . . The Government . . . must prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the Government has established its case, the defendant remains quiet at his peril . . . ”

See also, e.g., *United States v. Schipani*, 362 F.2d 825, 830 (2d Cir. 1966);** *United States v. Penosi*, 452 F.2d 217 (5th Cir. 1971).

* The Trial Court's review of this evidence as a basis for finding Hines guilty is at A. 222a-A. 234a.

* *Schipani* was a net worth case involving a gambler. It is important to note that after *Schipani*'s conviction was affirmed by this Court in the case cited above, the case was later remanded and evidence of a “likely source” of taxable income—in *Schipani*'s case gambling money—was excluded on Fourth Amendment grounds. In a retrial *Schipani* was again convicted and his conviction again affirmed by this Court, this time in a case in which the Government was able to offer no proof whatsoever of a likely source of income. *United States v. Schipani*, 414 F.2d 1262 (2d Cir. 1969). See also *United States v. Massei*, 355 U.S. 505 (1958). In Hines' case, as indicated in text above, there was not only

[Footnote continued on following page]

The Government's evidence negating sources other than gross income, coupled with the uncontested proof that Hines did have a continuing source of substantial gross income from pimping, more than sustained the Government's burden of proof.

Hines' complaints about the sufficiency of the Government's proof are either erroneous or irrelevant. Thus, on the question whether the Government adequately disproved inheritances as a source of the expenses, Hines says IRS (a) should have looked in Cook County, Illinois where Hines' father died, and (b) should have found out where all of Hines' relatives lived and died, (Br. at 10). As for the first, there was no need for IRS to bother to search where Hines' father died, because it proved by other means the only inheritance Hines got from his father. As for the second, it is settled that to meet the burdens of the net worth and expenditures theories, the Government does not have to do the impossible. For IRS to have identified all of Hines' relatives and then tracked down those who have died to their resting places would have been impossible and was not required. E.g., *United States v. Moody*, 371 F.2d 688, 692-93 (6th Cir.), cert. denied, 386 U.S. 1003 (1967); *Mignell v. United States*, 233 F.2d 731 (10th Cir. 1956).*

With respect to the bank account survey conducted by the Government, Hines gives completely unwarranted significance to the fact that IRS did not check for bank ac-

sufficient proof excluding non-income funds, but also clear and uncontradicted evidence of the defendant's pimping as a source of substantial gross income.

* Hines did not cooperate in the investigation, and thus excluded himself as a source of leads (Tr. 99-104). As the Supreme Court held in *Holland v. United States*, 348 U.S. 121, 138 (1954): "[W]here relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant."

counts in several places where it had some information that he may have lived at one time or another. Thus, IRS did not check for banks (1) near two Detroit addresses (one of which was on a document with a phoney name) given by Hines in 1967, a year when the IRS investigation showed Hines was in fact living in New York (GX 1, 2; A. 137a-39a); (2) near a Newark, New Jersey address to which Hines' one New York City savings bank account was changed, again during a year in which the investigation showed Hines was living in New York (GX 31-33; A. 137a); (3) in the City of Chicago, where IRS had information that Hines had lived at some unknown time prior to 1966 (A. 134a, 138a); or (4) in Memphis, Tennessee, where Hines was living and earning a tiny income working at a billiard room in 1960-62. In light of all the other evidence in this case, it is virtually certain that bank checks in these areas would not have disclosed any cash hoard.

POINT II

The Government amply proved that Hines' failure to file tax returns was wilful.

Hines argues that the Government's proof that he consistently concealed his true identity and employment and used cash for large business transactions was insufficient to prove that his failure to file returns was wilful. The argument has no merit.

The Government need not establish wilfulness by direct evidence, *e.g.*, by an admission by the defendant or by proof that he had filed returns in prior years. Proof of acts concealing the business which generates the income is sufficient to establish both knowledge of the tax* and

* Hines' gross income as proven at the trial exceeded the minimum amount for filing in each of the tax years by at least
[Footnote continued on following page]

deliberate failure to file or pay the tax under Section 7203. *United States v. Marquez*, 332 F.2d 162 (2d Cir. 1964); *Edwards v. United States*, 334 F.2d 360, 364-365 (5th Cir. 1964); *United States v. DeNiro*, 392 F.2d 753, 758 (6th Cir. 1968) (all substantive violations of Section 7203, by wilful failure to register for and pay the special wagering tax). See also *Ingram v. United States*, 360 U.S. 672 (1959) (conspiracy to evade special wagering tax).

This case, involving failure to file Federal *income tax* returns, is even a stronger one than the gambling cases cited above. In an earlier opinion in the *Edwards* litigation, 321 F.2d 324 (5th Cir. 1963), Judge Hays of this Court, sitting by designation, made the following observation: "We may assume, without deciding that in cases involving non payment of *income tax* . . . , the almost universal knowledge of the existence of that tax would justify placing the initial burden of proof of ignorance on the defendant" (321 F.2d at 326, n. 3; emphasis added).* Although we have found no case actually holding that a defendant is presumed to be aware of the obligation to file Federal income tax returns, cf. *Abdul v. United States*, 278 F.2d 234 (9th Cir.), cert. denied, 364 U.S. 832 (1960), it is at least clear, as Judge Hays went on to observe in the *Edwards* footnote, that the tax on income is far better known than was the rather esoteric wagering tax.**

\$12,000 and by over \$20,000 in one year, and so there was no possible question that he may have been aware of the general obligation to file returns, but was unaware that he had taken in enough income to be required to file.

* As the Trial Court noted in convicting Hines, there was no question that he was able to read and write (A. 237a).

** Hines' tortured attempts to avoid the impact of *Edwards* and the other wagering tax cases make no sense (Br. at 22-24). Although it is true that the gamblers were trying to hide a business which was subject to federal as well as local regulations and on which the tax was directly imposed, whereas Hines was

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Finally we note that the Government was not required to exclude on its direct case the possibility that Hines' various acts of concealment may have been motivated in part by a desire to hide his illegal pimping business from local authorities, as opposed to a desire to conceal an obligation to pay taxes. The facts were no different in the *Marquez*, *Edwards* and *Ingram* cases, *supra*, in all of which the courts held that proof of concealment of a gambling operation illegal under local law was by itself sufficient to establish knowledge of the gambling tax and wilful failure to register and pay it in violation of Section 7203. As this Court held in *Marquez*:

"... [T]he evidence of Marquez's behavior at the site of the gambling operation was certainly such as to establish wilfulness under the Spies rationale, even though the purpose may also have been the concealment of the operation from the scrutiny of the police." 332 F.2d at 166.

In any event, the Government *did* exclude such an alternative motive in this case, when it proved *over one-hundred* open conversations between Hines and New York City Police officers about details of his illegal pimping business (Tr. 230). This evidence was the plainest proof that Hines was not fearful of local authorities, but rather was engaging in the classic dodges and concealments of a tax evader, *Spies v. United States*, 317 U.S. 492 (1942), when he consistently lied about and concealed his identity, employment and financial transactions.

trying to hide conduct which was subject to only local investigation and which was only the source of the income to be taxed, those distinctions in no way support the conclusion that it is fair to infer knowledge of the tax on the part of the gambler, but not the pimp.

POINT III

Hines was in no way prejudiced by the District Judge's statement on the day both sides rested that it was disposed to find the Government's proof insufficient to convict.

Hines briefly complains that Judge Wyatt's statement at the close of the Government's case, indicating his disposition to acquit Hines for insufficiency of proof as to gross income, caused Hines to decide not to put any proof in, and thus prejudiced his case. The argument is utterly meritless.

At the close of the Government's case, the Trial Court stated "there is no basis whatsoever for the net worth theory here", and indicated its belief that the Government's circumstantial proof of gross income was not legally sufficient to convict (A. 191a). The Government then asked for and was given the opportunity to submit a post-trial memorandum, indicating that it had been at fault in not supplying the District Court with a brief on its legal theory and the evidence, much of which had been received in the form of stipulated testimony and exhibits (A. 201a-03a). Hines then offered two items of stipulated evidence, and rested (A. 204a-06a).

Two months later, after Judge Wyatt had reviewed all the evidence and the briefs supplied by both sides, he made the following statement:

"[T]he primary difficulty was my lack of familiarity with the decisions which had been rendered on the expenditure theory. I don't think during and at the close of the trial I really fully appreciated what the expenditure theory was. At any rate, after further reflection on the matter and a study of the cases and of the stenographic minutes and of the exhibits, I

am convinced that my initial impression was wrong and that the Government has in fact proved that the charges are sustained beyond a reasonable doubt. The variation in conclusions between the end of the trial and now is not at all due to questions of fact as I think to questions of law. This is the unusual case where there is no real issue of fact and there is no issue of credibility to be resolved" (A. 221a-22a).

Even assuming that Hines ever had any evidence to put in, he had full opportunity, in this non-jury case, to request to reopen once he became aware that the District Court had read the cases on the "expenditures" theory and had concluded that the Government's proof was legally sufficient. However, the fact that Hines made no such effort below and does not even venture to say now what proof he was foreclosed from offering demonstrates that he never had any defense to present, and that his argument is simply disingenuous.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Barbara S. Ambler being duly sworn,
deposes and says that she is employed by the United States Department
~~of Justice, ORGANIZED CRIME STRIKE FORCE IV~~ the Southern District
of New York.

That on the 9th day of December, 1974
she served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

Kalmon Gallup, Esq.
1345 Avenue of the Americas
New York City, New York

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Barbara S. Ambler

Sworn to before me this

9th day of December, 1974
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 1976